THE CURRENCY OF REPARATIONS: AFFIRMATIVE ACTION IN COLLEGE ADMISSIONS

DAVID J. TREVINO†

The purpose of this paper is to re-examine *Bakke*, in light of the challenges it has faced at the University of Michigan Law School and undergraduate school. This paper will look at the obstacles universities face in implementing the *Bakke* diversity rationale, and explore two possible avenues for justification of using race-conscious admissions measures. One justification for using race-conscious admissions policies is to remedy past societal discrimination. Another justification provided by the First Amendment may afford some protection to a university's admissions policy if properly worded. Justice Powell announced that

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† Candidate for J.D., St. Mary's University School of Law, May 2002; B.S., Radio-Television-Film, University of Texas at Austin, May 1990. I would like to thank all of the writers and editors who helped me on this comment, including: Scott P. Craig, Jon Haynes, Yvette Aguilar, Cassandra Charles, Dee Marlo Chico, Collin Cobb, Jorge Juarez, and Karla Jackson. Your input and hard work has been invaluable to me and is sincerely appreciated. I would like to thank all of my family and friends who I neglected over the last eight months; your patience and understanding gave me the strength to work when more attractive alternatives presented themselves. Lastly, I would like to thank all the professors at the law school who inspired me to do more than I thought possible.

diversity is a compelling interest under the First Amendment.[1] This First Amendment academic freedom has never been developed in the courts. Instead, race-conscious admissions policies have been struck down on Fourteenth Amendment grounds. All of these discussions take place through the lens of a color-blind interpretation of the Constitution.

I. IGNACIOUS AND REILLY[2]

Ignacious and Reilly are both sales representatives for the Pinkus Pharmaceutical Company. For years, Ignacious has used particularly dirty tactics to climb up the corporate ladder. Ignacious spared no one in his climb to the top. He saw no problem with using unethical means to reach a favorable standing in the eyes of his boss. Mr. Reilly embodies integrity. He never resorts to the unscrupulous practices that skyrocketed Ignacious to the top of the heap. The concept of cheating is not even within the realm of acceptable behavior for Mr. Reilly. When the blind Mr. Pinkus finally retired, he awarded his top salesman the privilege of stepping into his shoes. Ignacious' promotion was bittersweet; on the one hand, he was glad to have made it to the top, while on the other, he was not proud of how he got there. To show his remorse, Ignacious enacted new company rules that prohibited anyone from ever climbing up the corporate ladder in a dishonest way. Reilly protests, claiming he was robbed of the top spot by the thief Ignacious. Reilly wants Ignacious to step down and anoint Reilly successor of the Pinkus Company. After all, he did play honorably and according to the new standards. While Ignacious sees the point, he does not exactly see eye-to-eye with Reilly and is content that in the future such behavior will be eliminated. Ignacious continues to benefit from his status, while Mr. Reilly continues to struggle.

A similar question faces America in the educational arena. Should victims of ethnic groups that suffered discrimination at the hands of the federal government be given special consideration when applying for admission to state-supported, higher educational institutions as a form of reparation for the harm caused by the government? This is one question

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1. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311-12 (1978) (writing that the First Amendment gives universities the power to decide who they will teach). See U.S. CONST. amend. I, which states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. The names for the characters of Ignacious and Reilly are taken from the name of the title character in JOHN KENNEDY TOOLE, A CONFEDERACY OF DUNCES (1980). This book's unlikely hero, Ignacious J. Reilly, is not altogether unlike the fictitious Ignacious used in this introduction.

that the Eastern District of Michigan judiciary recently faced, where two cases, using *Bakke* as a guiding light, arrived at different conclusions.[3]

II. What Position Do Minorities Occupy in the Social, Political, and Educational Strata?

In 1988, Hispanics, Blacks, Asians, and Native Americans represented 27% of the total United States population.[4] The Census Bureau projects that by the year 2050, these groups will comprise about half of the U.S. population.[5] In terms of education, Blacks, Hispanics, and Native Americans experience educational disadvantages when compared to white children.[6] Asians and Caucasians are more likely to possess an education beyond high school than their Hispanic and Black counterparts.[7] In 1997, 9% of Caucasians and 15% of Asians held advanced degrees compared to only 4% of Blacks and 3% of Hispanics.[8] Furthermore, Caucasians are 50% more likely to attain a four-year degree than Blacks and Hispanics combined.[9] In 1997, the percentage of Caucasians with Bachelor's de-

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3. Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (addressing the extent to which race is a factor in the law school's admission decisions); *see also* Gratz v. Bollinger, 122 F. Supp. 2d 811, 819-21 (E.D. Mich. 2000) (discussing the justification of "race" as a criterion in the admission process of a state university); *cf.* R. Richard Banks, *Meritocratic Values and Racial Outcomes: Defending Class-Based College Admissions*, 79 N.C. L. Rev. 1029 (developing an argument for taking socioeconomic status into account, thereby achieving the desired affect of racial redistribution). *See generally* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265; John H. Bunzel, *Education Law and Policy: The Diversity in Higher Education*, 29 Fordham U.R.B. L.J. 489 (declaring the difficulties with which the schools and the courts have had in addressing affirmative action in higher education); Jon Mills, *Diversity in Law Schools: Where are We Headed in the Twenty-First Century*, 33 U. Tol. L. Rev. 119 (stating the importance of working towards balancing the need for a diverse student body versus the law on diversity-based admissions).

4. Council of Economic Advisers for the President's Initiative on Race, Changing America: Indicators of Social and Economic Well-Being by Race and Hispanic Origin 4 (1998).

5. *Id.*; *see Census Finds 5 Big Cities in Ohio Smaller*, N.Y. Times, Mar. 17, 2001, at A8; *A New Look at Race in the States*, N.Y. Times, Mar. 20, 2001, at A18.

6. Council of Economic Advisers for the President's Initiative on Race, *supra* note 4, at 13.

7. *Id.* at 20. *See generally* Note, *The Constitutionality of Race-Conscious Admissions Programs in Public Elementary and Secondary Schools*, 112 Harv. L. Rev. 940 (1999) (exploring the history of segregation and its impact on current educational opportunities).

8. Council of Economic Advisers for the President's Initiative on Race, *supra* note 4, at 20. *See generally* Note, *An Evidentiary Framework for Diversity as a Compelling Interest in Higher Education*, 109 Harv. L. Rev. 1357 (1996) (highlighting the disparity among the races in higher education).

9. Council of Economic Advisers for the President's Initiative on Race, supra note 4, at 22. *See generally* Comment, *Diversity as a Compelling State Interest in Higher Education: Does* Bakke *Survive Affirmative Action Jurisprudence*, 79 Or. L. Rev. 493 (2000) (showing the relationship between race and higher education).

grees was 33%, in contrast to only 14% for Blacks and just 11% for Hispanics.[10] These numbers are generally the same across the board in other areas such as economic status, health, and housing.[11]

The bottom line in this country is that race and ethnicity are reasonable indicators of wealth, health, and educational opportunities.[12] Is this the same head start Ignacious gained over Reilly? There is a connection between our country's history of discrimination against African Americans and disparities in wealth among the races. Slavery, Jim Crow, and discarded governmental and societal views regarding minorities have left their mark on today's distribution of wealth and political power.[13] Given the percentages, it is reasonable to ask whether compensating minority groups for the effects of past societal, institutional, and judicially-approved discrimination is a compelling governmental interest, and whether the use of quotas to reverse these effects will provide the narrowly tailored means by which to effectuate this goal. The Fifth Circuit answered these questions in the negative.[14]

III. *HOPWOOD V. TEXAS* - THE DECLINE OF *BAKKE*

In *Hopwood v. Texas*,[15] the Fifth Circuit invalidated a University of Texas Law School admissions policy that gave weight to applicants from

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10. COUNCIL OF ECONOMIC ADVISERS FOR THE PRESIDENT'S INITIATIVE ON RACE, supra note 4, at 22. *See generally* Pace Jefferson McConkie, *Race and Higher Education: A Rallying-Cry for Racial Justice and Equal Educational Opportunity*, 21 U. ARK. LITTLE ROCK L. REV. 979 (1999) (discussing race and its impact on educational opportunities in admission to college).

11. *See generally* ROBERT L. WOODSON, RACE AND ECONOMIC OPPORTUNITY (1989) (explaining that race and economic success are closely linked); COUNCIL OF ECONOMIC ADVISERS FOR THE PRESIDENT'S INITIATIVE ON RACE, *supra* note 4.

12. *See* COUNCIL OF ECONOMIC ADVISERS FOR THE PRESIDENT'S INITIATIVE ON RACE, *supra* note 4, at 2.

13. Tuneen E. Chisolm, Comment, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. PA. L. REV. 677, 687 (1999) (citing Melvin L. Oliver & Thomas M. Shapiro, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 12-13 (1995), which explains the connection between wealth and race). *Chisolm* also asserts that "[t]o assume that the statistics reflecting black and white inequities have no relation to past patterns of discrimination is to accept an argument that these statistics reflect the true inherent abilities or disabilities of African Americans. *Id.* at 688.

14. Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996). The court held that race may not be used as a factor in admission in order to achieve a diverse student body. *Id.* at 962. Despite any past discrimination a minority may have faced, the school may not admit minorities based on using race as a factor for admission. *Id.*

15. 78 F.3d 932 (5th Cir. 1996).

minority backgrounds.[16] Cheryl Hopwood and three other white applicants to the University of Texas Law School were denied admission and sued the university under the Equal Protection Clause of the Fourteenth Amendment,[17] claiming impermissible racial discrimination by the law school's admissions committee.[18] *Hopwood* is a significant case in the affirmative action landscape because it did not follow the Supreme Court's ruling on the use of race in college admissions.[19] *Hopwood* ushered in a new era of admissions policies at Texas universities, spawning the "Top 10% Law."[20] The three-judge panel, unable or unwilling to find a consensus, in the *Bakke* opinion, refused to follow it.[21] The Fifth

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16. *See id.* at 935-38. This case has been pivotal in readdressing the use of race as a factor in the college admissions process. *See id.* at 962. The court in *Hopwood* held that:

> The University of Texas School of Law may not use race as a factor in deciding which applicants to admit in order to achieve a diverse student body, to combat the perceived effects of a hostile environment at the law school, to alleviate the law school's poor reputation in the minority community, or to eliminate any present effects of past discrimination by actors other than the law school.

Id. at 962.

17. U.S. CONST. amend. XIV, § 1. The Equal Protection Clause reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

18. *See Hopwood*, 78 F.3d at 938. The University of Texas School of Law had various measures in place, such as color-coding applications by race, to ensure that they maximized their applicant pool for their objective of having a diverse student body. *Id.* at 938-39. *See generally* Texas v. Lesage, 528 U.S. 18 (1999) (describing another attempt by a state university to use race-conscious admissions to further its desire for a diverse student population).

19. Barbara Phillips Sullivan, *The Gift of* Hopwood*: Diversity and the Fife and Drum March Back to the Nineteenth Century*, 34 GA. L. REV. 291, 294 (1999) (describing the Fifth Circuit's criticism and condemnation of the consideration of racial diversity as contrary to the Equal Protection Clause). *See generally* U.S. CONST. amend. XIV, § 1 (containing the Equal Protection Clause which is used in matters of race); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (citing the matter of race-based admissions for institutions of higher learning).

20. *See* Gary M. Lavergne & Dr. Bruce Walker, *Academic Performance and Persistence of Top 10% Students: Academic Year 1999-2000 and Fall 2000*, available at http://www.utexas.edu/student/research/reports/admissions/HB588-report3.html (last visited on Feb. 16, 2002). In response to *Hopwood*, the University of Texas at Austin implemented a new admission scheme where the top ten percent of all high school students were automatically granted admission. *Id.* The University of Texas at Austin is hoping that this measure will encourage minority enrollment to its school. *Id.*

21. *Hopwood*, 78 F.3d at 962 (finding that a majority of the Justices in *Bakke* did not agree with Powell's diversity rationale). In *Bakke*, six Justices filed opinions, none of which garnered more than four votes (including the writer's). *Id.* at 944. The two major

Circuit held that a majority of the Justices in *Bakke* did not join in Justice Powell's part of the opinion that stated race could be used as a factor in college admissions under the principle of academic freedom emanating from the First Amendment.[22] Instead, the Court cited *City of Richmond v. J.A. Croson Co.*,[23] a remedial Minority Business Utilization Plan case, for the proposition that it is unconstitutional to correct an injustice to a "Black man" by discriminating against someone who is White.[24]

The Court further cited *Adarand Constructors, Inc. v. Pena*[25] for the proposition that contemporary equal protection jurisprudence recognizes remedying the present effects of past racial discrimination as the sole compelling governmental interest.[26] This decision is especially remarkable given the fact that one only needs to look fifty years back for evidence of past discrimination at the University of Texas Law School.[27] The Fifth

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opinions — one opinion by Justices Brennan, Marshall, White, and Blackmun and the other by Justice Stevens in which Chief Justice Burger and Justices Rehnquist and Steward joined — reflected completely contrary views of the law. *Id.* at 941; *cf. Bakke*, 438 U.S. at 265 (writing opinions reflecting conflicting views).

22. *See Hopwood*, 78 F.3d at 944 (reasoning that such a view is not binding since no other Justice joined in Powell's portion of the opinion discussing diversity); *see also* Milwaukee County Pavers Ass'n v. Fiedler, 922 F.2d 419, 422 (7th Cir. 1991) (illuminating the point that the government can only step in for the purpose of remedying discrimination against minorities and not for the sake of diversity).

23. 488 U.S. 469 (1989) (noting that the Minority Business Utilization Plan requires contractors to subcontract at least 30% of each contract's dollar amount to businesses owned by minorities).

24. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 528 (1989) (Scalia, J., concurring) (stating the "standard of review under the Equal Protection Clause is the same regardless of the race of those burdened or benefited by a particular classification"); *see also Hopwood*, 78 F.3d at 934-35.

25. 515 U.S. 200 (1995).

26. Hopwood, 78 F.3d at 944-45 (pointing out that no case, other than *Bakke*, has ever accepted diversity as a compelling state interest and that in fact, the Court has now retreated from the position); *see also Croson*, 488 U.S. at 509 (holding that "in an extreme case, some form of narrowly tailored racial preference may be necessary to break down patterns of deliberate exclusion). *See generally* Christopher Edley, Jr. & Dinesh D'Souza, *Affirmative Action Debate: Should Race-Based Affirmative Action be Abandoned as a National Policy?*, 60 ALB. L. REV. 425 (1996) (discussing the *Hopwood* decision in a debate about the state of affirmative action and what the government can do); Symposium, *Many Billions Gone: Is it Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429 (1998) (debating the issue of using corrective means to retard past and present discrimination).

27. Sweatt v. Painter, 339 U.S. 629, 636 (1950) (ordering Heman Sweatt, an African-American, to be admitted to the all-White law school at The University of Texas largely because the law school was funded by the state and also as a matter of Equal Protection Clause compliance). More information concerning the man to break the color-barrier at U.T. Law can be found at the University of Texas School of Law's Tarlton Law Library, as well as information about the annual symposium held in his honor.

Circuit's refusal to follow *Bakke* and the Supreme Court's official stance with respect to race-conscious admissions is a logical extension of the post-*Bakke*, color-blind jurisprudence surrounding affirmative action.[28]

IV. DOCTRINAL FRAMEWORK-BASIC INFORMATION AND BACKGROUND

What is racial discrimination? One of the difficulties in answering this question is that today, this term carries with it many different meanings and depending on one's political disposition, encompasses different situations. Black's Law Dictionary defines discrimination as "the effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion, or handicap."[29] The Fourteenth Amendment prohibits governmental discrimination on the basis of race.[30] The Supreme Court refined this definition by requiring complainants to produce evidence of discriminatory intent in *Washington v. Davis*.[31]

In *Washington*, minority applicants to the District of Columbia Police Department were denied employment because of low personnel test scores.[32] They asserted that the police department's hiring and recruiting

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28. Charles R. Lawrence III, *Each Other's Harvest: Diversity's Deeper Meaning*, 31 U.S.F. L. REV. 757, 768 (1997) (arguing that the Fifth Circuit's decision in *Hopwood* is an inevitable consequence of Powell's restrictive conception of remedial affirmative action); Sullivan, *supra* note 19, at 296 (describing Powell's conception of diversity as "problematic").

29. BLACK'S LAW DICTIONARY 479 (7th ed. 1999).

30. *See* U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.; *see also* Shaw v. Hunt, 517 U.S. 899, 907-08 (1996) (discussing that the intended purpose of the Fourteenth Amendment is to prohibit race classifications by state governments); *Croson*, 488 U.S. at 491 (stating the intent of the Fourteenth Amendment is to limit state governments' use of race-based classifications); McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (stating the primary objective of the Fourteenth Amendment is to forbid racial discrimination by state actors).

31. *See* Washington v. Davis, 426 U.S. 229, 239, 245-46 (1976) (noting that a law is not offensive to the Constitution merely because it disproportionately impacts an ethnic group). *But see* Castro v. Beecher, 459 F.2d 725, 732-733 (1st Cir. 1972); Chance v. Board of Examiners, 458 F.2d 1167, 1176-77 (2nd Cir. 1972).

32. *See Washington*, 426 U.S. at 232-33. A higher percentage of black than white applicants failed "Test 21," a civil service exam administered to all prospective governmental employees. *See id.* at 235. The test is used throughout federal service and is not developed

practices discriminated on the basis of race through a series of procedures that included a written personnel test that excluded a disproportionate number of African Americans.[33] The rejected applicants asserted that the police department violated their rights under the Due Process Clause of the Fifth Amendment[34] to the Constitution under 42 U.S.C. § 1981.[35] The applicants brought a Title VII suit alleging that the examination was discriminatory because a disparate number of minorities were not being hired on the basis of their test scores.[36] The Court held that although a disparate impact on a particular ethnic group is a factor to be considered, disparate impact alone, without evidence of discriminatory purpose, does not activate the strict scrutiny standard that is justified in only the rarest of circumstances.[37]

Washington raised the standard required to show racial discrimination by injecting an intentional element into the equation.[38] Intent is an important element when examining the effects a particular governmental

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by the police department. *Id.* It is "designed to test verbal ability, vocabulary, reading, and comprehension." *Id.*

33. *Id.* at 233. Two of the black officers who did not pass the test to become officers in the District of Columbia Metropolitan Police Department, filed suit. *Id.* at 232. Respondents sought declaratory judgment and an injunction for allegations that the tests were racially discriminatory. *Id.*

34. U.S. CONST. amend. V. The Due Process Clause states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

Id.

35. 42 U.S.C. § 1981 (1994). Section 1981 of Title 42 states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Id.; *see also Washington*, 426 U.S. at 233-34 (citing 42 U.S.C. § 1981 and using constitutional basis for review).

36. *Washington*, 426 U.S. at 233.

37. *Id.* at 242; *see also* McLaughlin v. Florida, 379 U.S. 184, 192, 196 (1964) (writing that an explicit racial classification in a criminal statute is suspect and calls for "the most rigid scrutiny" and has a strong presumption of being unconstitutional).

38. Village of Arlington Heights v. Metropolitan Housing Development, 429 U.S. 252, 264-65 (1977) (reiterating that discriminatory impact is not the only factor to be examined when finding an official act unconstitutional); *Washington*, 426 U.S. at 239 (writing that a disparate impact of a statute on a particular minority group does not automatically mean that that statute is unconstitutional without evidence of discriminatory purpose).

policy has on members of a minority group. Essentially, a law that is facially neutral, but disparately impacts a particular minority group, carries a presumption of validity under the Constitution.

Making matters worse for affirmative action proponents, the Supreme Court rejected the assertion that a history of both private and public discrimination justifies the use of a racial quota system designed to favor minority business owners in *City of Richmond v. J.A. Croson Co.*[39] The Supreme Court, applying strict scrutiny, held that the city failed to demonstrate a compelling interest in reserving thirty percent of its contracting opportunities to business owners on the basis of race.[40] The Court also noted that the wording of the policy[41] was not narrowly tailored to remedy the present effects of past discrimination.[42] Quoting *Wygant v. Jackson Board of Education*,[43] the Court wrote, "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."[44] A 1995 case, *Adarand Constructors, Inc. v. Pena*,[45] further eliminated the distinction between benign and invidious discrimination.[46]

In *Adarand*, a construction company asserted that the federal government's practice of rewarding general contractors for hiring subcontractors run by "socially and economically disadvantaged individuals" violated the Equal Protection component of the Fifth Amendment's Due Process

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39. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499 (1989).

40. *Id.* at 505 (forecasting the evils that would occur in a society where race is irrelevant if the claim of past societal discrimination serves as the basis for racial preferences).

41. *Id.* at 477-78 (citing the original wording of the challenged ordinance that set aside thirty percent of its business to Minority Business Enterprises controlled and owned by at least fifty-one percent minority group members who are defined as U.S. citizens who are Black, Spanish-speaking, Asian, Indian, Eskimo, or Aleut).

42. *See id.* at 508 (reasoning that the over-inclusiveness of the statute would give successful minorities an absolute advantage based solely on their race).

43. 476 U.S. 267 (1986).

44. *Croson*, 488 U.S. at 497-98 (finding that the same defects in *Wygant* were present in the instant case); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (describing societal discrimination as an inadequate basis for racial preferences); *see also* Loving v. Virginia, 388 U.S. 1, 11 (1967) (writing that racial classifications in statutes are examined under the most rigid scrutiny); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964) (reasoning that statutes that have explicit racial categories subject themselves to rigid scrutiny when examined by the judiciary); E. John Gregory, Comment, *Diversity is a Value in American Higher Education But It is Not a Legal Justification for Affirmative Action*, 52 FLA. L. REV. 929, 931-32 (2000) (explaining the Supreme Court's rejection of affirmative action programs that merely address past societal discrimination).

45. 515 U.S. 200 (1995).

46. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (writing that holding benign racial classifications to a different standard is not compatible with the command of the Fifth and Fourteenth Amendments).

Clause.[47] The Supreme Court held that the Fourteenth Amendment's Equal Protection Clause and Fifth Amendment's Due Process Clause require a review of all racial classifications implemented by the federal, state, or local government under a strict scrutiny standard.[48] Strict scrutiny requires a racial classification to be narrowly tailored and must further a compelling governmental interest.[49]

Before *Adarand*, the Court articulated the difference between a governmental regulation meant to subjugate a minority group and a regulation meant to help a minority group achieve equality under the law.[50] In *Metro Broadcasting, Inc. v. FCC*,[51] the Court held that benign racial classifications were only subject to the less exacting intermediate scrutiny standard and passed constitutional muster as long as they served important governmental objectives and were substantially related to their achievement.[52]

Thus, universities wishing to implement affirmative action admissions policies cannot rely on the imprimatur of societal discrimination to justify racially remedial measures.[53] The use of explicit racial classifications

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47. *See id.* at 204.

48. *See id.* at 227 (retreating from the concept in *Metro* that benign racial classifications meant to help minorities are subject to intermediate scrutiny and holding that the Constitution does not tolerate racial classification of any kind, be they malignant or benign).

49. Hunt v. Cromartie, 526 U.S. 541, 546 (1999) (asserting that racial classification embedded in laws are constitutionally suspect and subject to strict scrutiny); *Adarand*, 515 U.S. at 227 (concluding that all racial classifications must satisfy strict scrutiny to survive constitutional challenge); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985) (holding that classifications based on race, sex, or national origin will be reviewed under strict scrutiny).

50. *See* Guardians Ass'n v. Civil Service Comm'n, 463 U.S. 582, 590 (1983) (writing that Title VI did not forbid benign racial classifications and was consistent with the Constitution); Fullilove v. Klutznick, 448 U.S. 448, 484 (1980) (holding that it is not prohibited when a nonminority firm is not awarded a contract as a result of the challenged statute which was enacted to remedy the effects of past discrimination).

51. 497 U.S. 547 (1990).

52. See Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 548-49 (1990) for a discussion between racial classifications that are meant to help a minority group and those which are meant to subjugate a minority group. The Court in *Metro*, using intermediate scrutiny, held that a program designed to help minorities become owners of television and radio stations was consistent with the equal protection principles of the Constitution under an intermediate scrutiny standard. *See id.* It was concluded that diversity is an important governmental objective. *See id.* at 596-97.

53. City of Richmond v. J.A. Croson, 488 U.S. 469, 497-98 (1989) (reiterating the policy that societal discrimination without a finding of discriminatory purpose is not a sufficient justification for imposing a racially classified remedy); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (holding that societal discrimination is too "amorphous" to impose a racially classified remedy); *see also* Gregory, *supra* note 44, at 931-32 (explaining that past societal discrimination is an inadequate basis for affirmative actions programs).

favoring minorities must pass a strict scrutiny test.[54] Conversely, a facially neutral admissions policy favoring "legacies"[55] would pass constitutional muster, absent a finding of discriminatory intent, because it is a facially neutral policy despite the fact that minorities are disparately impacted and the beneficiaries are predominately White.[56] Both *Croson* and *Adarand* relied on *Regents of the University of California v. Bakke*[57] to invalidate the affirmative action policies that benefited minority business owners.[58]

V. *BAKKE*-THE GENESIS OF RACIAL DIVERSITY AS A COMPELLING GOVERNMENTAL INTEREST

In *Bakke*, a white male denied admission to a state medical school challenged the legality of the school's admissions program that set aside sixteen percent of its incoming class for minority students.[59] The California Supreme Court affirmed the trial court's finding that the university's race-based admissions program was unconstitutional under the Fourteenth Amendment's Equal Protection Clause and ordered Bakke admitted into the medical school.[60] The university sought and was granted certiorari from the U.S. Supreme Court.[61]

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54. *See Cromartie*, 526 U.S. at 547 (writing that explicit racial classifications are subject to strict scrutiny); *Adarand*, 515 U.S. at 227 (concluding that strict scrutiny applies to all racial classifications); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985) (holding strict scrutiny applies to classifications based on race).

55. *See* Gitanjali S. Gutierrez, Note, *Taking Account of Another Race: Reframing Asian-American Challenges to Race-Conscious Admissions in Public Schools*, 86 CORNELL L. REV. 1283, 1299 (2001) (describing the policy of legacy admissions as favoring an applicant because a family member is an alumnus).

56. *See id.* at 1299 (discussing college admissions programs that implement affirmative action methods to compensate for historical discrimination against minorities are invalidated using a race-neutral analysis, while that same race-neutral analysis does not affect other "plus categories" used in admissions decisions such as consideration of legacies, musicians, and the geographically diverse, all of which benefit a disproportionately white population).

57. 438 U.S. 265 (1978).

58. *See Adarand*, 515 U.S. at 218 (citing *Bakke* for the proposition that the concept of equal protection must mean the same thing when applied to every race); *Croson*, 488 U.S. at 493 (writing that racial classifications should only be used for remedial settings because of the danger of stigmatic harm).

59. *See Bakke*, 438 U.S. at 265-66.

60. *See generally* Bakke v. Regents of the Univ. of Cal., 553 P.2d 1152 (Cal. 1976).

61. *See* Regents of the Univ. of Cal. v. Bakke, 553 P.2d 1152 (Cal. 1976), *cert. granted*, 429 U.S. 1090 (1977) (U.S. Feb. 22, 1977) (No. 76-811).

Justice Powell delivered the opinion of the Court and handed down what would become the accepted rule of law for the next twenty years.[62] At its core, *Bakke* stands for the proposition that achieving a diverse student body qualifies as a compelling state interest that may be pursued through the consideration of race as a factor in the admissions process. That process must not, however, resort to the use of quotas.[63] While Powell's diversity rationale appears to settle the problem presented to universities striving for a diverse student body, the reasoning accompanied by the Court's solution is unstable, eventually melting down and collapsing when scrutinized by the Fifth Circuit's *Hopwood* decision.[64]

Bakke's meltdown is an inevitable consequence of applying Powell's diversity rationale.[65] Instead of grounding his solution in terms of racial justice, Powell looked to the First Amendment[66] concept of academic freedom[67] and held that attainment of a diverse student body is a constitutionally acceptable goal for a university to achieve.[68] Academic freedom, while not specifically enumerated in the Constitution, has long been regarded as a concern of the First Amendment and is derived from four essential freedoms.[69] Academic freedom gives a university the power to select its professors, curriculum, methods of instruction, and student

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62. *See* Charlotte Hawkins Johnson, *Keeping the Door Open: The Fight to Keep Race-Conscious Admissions in Higher Education*, NAT'L BAR ASS'N MAG., July-Aug. 2001, at 20 (stating that under *Bakke*, the settled rule of law regarding college admissions is that diversity is a compelling state interest and race may be considered as one of the many factors).

63. *See Bakke*, 438 U.S. at 320 (ordering Bakke admitted to the U.C. Davis medical program and vacating that portion of the opinion enjoining the university from ever considering race as one of many criteria for awarding admission); *see also* Johnson, *supra* note 62, at 20 (writing that under *Bakke*, the consideration of race as one of many factors to be examined is permissible in the college admissions process).

64. *See* Sullivan, *supra* note 19, at 292-96 (criticizing Powell's take on diversity, first as a vehicle to perpetuate white supremacy by encouraging the token assimilation of minorities to enhance their education, and then as justifying the existence of gender segregated institutions in the name of diversity in educational choice).

65. *See id.* at 295-96 (describing Powell's conception of diversity as "flawed"); *see also* Lawrence, *supra* note 28, at 768-69 (arguing that *Hopwood* is the outcome of taking Powell's remedial affirmative action restriction to its logical extreme).

66. *See* U.S. CONST. amend. I.

67. *See Bakke*, 438 U.S. at 311-12 (quoting Justice Frankfurter's statement in Sweezy v. N.H., 354 U.S. 234, 263 (1957) that universities must have the freedom to chose which students should comprise the student body and to create an environment of speculation, experiment, and creation).

68. *See Bakke*, 438 U.S. at 311-12, 320 (reversing the portion of the lower court's judgment enjoining the University of California from ever considering race in a properly devised admissions program).

69. *See Bakke*, 438 U.S. at 312 (citing Justice Frankfurter's conception of academic freedom, which has a history of being afforded a special protection by the First Amendment).

body.[70] By taking this route, Powell undermines the true spirit of any affirmative action policy, which is to remedy society's racism and promote racial justice and equality.[71] Even though it may hang in the balance, *Bakke* remains the Supreme Court's authoritative position on the use of race-based admissions in higher education.[72]

A comprehensive examination of the impact *Bakke* has on minority admissions to law and medical schools has revealed that gains in this area have been minimal.[73] It is possible that a more radical approach that expressly endorses the use of race-based policies in college admissions programs may yield a higher percentage of minorities admitted into colleges and universities.[74] Instead, the First Amendment-based diversity rationale, embraced by only one Justice, has been the subject of controversy and litigation in the lower courts.[75]

In *Bakke*, at least four Justices agreed that race could be used as a factor in the admission process under special circumstances.[76] Powell articulated the diversity rationale, but no other justice joined in that section of the opinion.[77] Thus, a challenge to interpreting *Bakke* arises from the fact that Powell's diversity rationale, the central holding of the opinion, is

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70. *See Bakke*, 438 U.S. at 312 (citing Justice Frankfurter's enumeration of the four essential components of academic freedom in Sweezy v. N.H., 354 U.S. 234, 263 (1957)).

71. Lawrence, *supra* note 28, at 765-69 (arguing the purpose of affirmative action is not to achieve education diversity, a purpose which benefits white privilege, but rather its true purpose is to promote equality among the races); Sullivan, *supra* note 19, at 298 (writing that the Powell diversity scheme undermines the true purpose of diversity, which is to promote racial justice and equality, and arguing that diversity in *Bakke* enhanced First-Amendment academic freedom and not racial equality).

72. Norman Redlich, *"Out, Damned Spot; Out, I Say." The Persistence of Race in American Law*, 25 VT. L. REV. 475, 506 (2001) (describing *Bakke* as the Supreme Court's stance on the use of race in college admissions).

73. *See id.* 506 (describing a study conducted by Susan Welch and John Gruhl that found minority enrollment in law and medical schools since *Bakke* has only marginally increased); *see also* Susan Welch & John Gruhl, *Does* Bakke *Matter? Affirmative Action and Minority Enrollments in Medical and Law Schools*, 59 OHIO ST. L.J. 697, 717 (1998) (studying *Bakke's* effect on Hispanic and African-American enrollment in medical and law schools).

74. Redlich, *supra* note 72, at 506-07 (writing on the failure of *Bakke* to produce meaningful increases in minority enrollment in institutions of higher education).

75. *See id.*

76. Philip T.K. Daniel & Kyle Edward Timken, *The Rumors of My Death Have Been Exaggerated:* Hopwood's *Error in "Discarding"* Bakke, 28 J.L. & EDUC. 391, 396 (1999) (concluding that Justices Brennan, Marshall, White, and Blackmun would have upheld the benign discrimination as being remedial in nature and subject to the less exacting intermediate scrutiny standard).

77. Victor G. Rosenblum, *Surveying the Current Legal Landscape for Affirmative Action in Admissions*, 27 J.C. & U.L. 709, 710 (2001) (asserting that the portion of Powell's opinion dealing with diversity was not joined by any of the other Justices).

not embraced by a majority of Justices.[78] With its numerous concurring and dissenting opinions, *Bakke* has been subject to flexible interpretation.[79] It is this flexibility that has left *Bakke* vulnerable to attacks, resulting in inconsistent interpretations in the lower courts.[80]

Justice Powell authored the deciding opinion that provided a middle ground between two opposing pluralities.[81] Applying strict scrutiny, Justice Powell found that the attainment of a diverse student body was clearly a constitutionally acceptable objective for an institution of higher education.[82] He reasoned that a university's interest in diversity is a compelling interest with respect to an admissions policy; however, he emphasized that diversity can only be one of many factors a university can use to build a heterogeneous student body.[83]

Remaining true to *Bakke*, while striking a constitutional balance between impermissible race-based quotas and acceptable consideration of ethnicity, has been a challenge for lower courts and public universities across the country.[84] As qualified white applicants have brought suit against universities with affirmative action admissions policies, higher ed-

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78. *See Bakke*, 438 U.S. 324, 379, 387, 402, 408. Justice Powell delivered the opinion of the Court. Justices Brennan, White, Marshall, and Blackmun filed an opinion concurring in part and dissenting in part. Justices White, Marshall, and Blackmun each filed separate opinions. Justice Stevens, concurred and dissented in part and filed an opinion in which Chief Justice Burger, Justice Stewart, and Rehnquist joined.

79. Redlich, *supra* note 72, at 506-07 (describing the lack of consensus among the Justices in *Bakke,* which have left the diversity standard subject to differing meanings and challenge in the lower courts).

80. *See generally* Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996) (arguing the portion of *Bakke* is not controlling because it never garnered support from more than one Justice); Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (arguing that the portion of Powell's opinion in *Bakke* dealing with diversity was not endorsed by any of the other Justices and that subsequent Supreme Court cases such as *Adarand* and *Croson* explicitly foreclose the possibility of using racial classifications); Gratz v. Bollinger, 122 F. Supp. 2d 811 (E.D. Mich. 2000) (agreeing that *Bakke* was still controlling law in the area of college admissions); Johnson v. Board of Regents of the Univ. Sys. of Ga., 106 F. Supp. 1362, 1368-69 (S.D. Ga. 2000) (stating that Powell's opinion regarding the compelling nature of student body diversity in university admission is not binding percent); *see also* Redlich, *supra* note 72, at 506-07 (writing that disagreement among the Justices in *Bakke*, have attributed to the lack of uniformity in its interpretation).

81. Daniel & Timken, *supra* note 76, at 396-98 (describing the breakdown of the various dissenting and concurring opinions).

82. *Bakke*, 438 U.S. at 311-12 (holding that an admissions program, properly executed, could constitutionally consider race as one of many factors in achieving a racially diverse student body).

83. *Bakke*, 438 U.S. at 317-19 (describing a situation where race, depending on the circumstances surrounding a particular student body and applicants for the incoming class, may serve as a positive consideration for a given applicant).

84. Ann G. Sjoerdsma, *Educational Diversity Under Attack, Rulings: Increasingly U.S. Courts Reject Admission Plans, Inspired by the 1978* Bakke *Case, as Unconstitutional Race*

ucation institutions have scrambled to accommodate both underrepresented minorities and qualified non-minority applicants within the parameters set by *Bakke*.[85]

In recent years, universities relying on *Bakke* to defend their race-based admissions programs have found the diversity rationale skating on thin ice. Many academic institutions have adopted or incorporated the diversity concept into their educational mission.[86] Race-based admissions policies relying on *Bakke* hang from the Constitution by a thread. Each political and legal assault wrought by white plaintiffs who are denied admission to institutions of higher education in the name of diversity weaken the fragile holding in *Bakke*.

Do white plaintiffs have standing to assert that they are being excluded from the higher education system on the basis of race? Even in colleges where race-conscious admissions policies prevail, the majority of students will still be White.[87] Going back to Ignacious and Reilly, Ignacious has already secured the upper hand. Ignacious undoubtedly benefited from his unfair tactics, and the same can be said for the people at the top of the social and economic strata. While they are definitely not personally responsible for the mistreatment of racial minorities, they are undoubtedly the beneficiaries of such discrimination whether they realize or agree with that proposition. Like it or not, past subordinating schemes have given Whites a "head start" at the best jobs, schools, and has created a culture that privileges Whites.[88]

When a white person claims they are being excluded because of their race, another way to frame that assertion is that because of their higher GPA or test scores, their inclusion or admission is meritorious, as opposed to a minority with lower numerical qualifications. What if minori-

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Discrimination, BALT. SUN, Mar. 26, 2000, at 1C (reviewing the climate in today's courts with respect to the *Bakke* decision).

85. *See generally Hopwood*, 78 F.3d at 932 (declining to follow *Bakke*); *Grutter*, 137 F. Supp. 2d at 821 (declining to follow *Bakke*); *Gratz*, 122 F. Supp. 2d at 811 (following *Bakke*); *Johnson*, 106 F. Supp. 2d at 1368-69 (declining to follow *Bakke*).

86. Johnson, *supra* note 62, at 20 (stating that because of *Bakke*, many universities have incorporated diversity statements into their mission); *see also* Daniel & Timken, *supra* note 76, at 391-92 (stating that universities, relying on *Bakke*, have devised admissions policies that consider race).

87. See Susan Welch & John Gruhl, *Does* Bakke *Matter? Affirmative Action and Minority Enrollments in Medical and Law Schools*, 59 OHIO ST. L.J. 697, 717 (1998) for an explanation attributing increasing minority enrollments to a demographic shift in the African-American population.

88. ROY L. BROOKS ET AL., CIVIL RIGHTS LITIGATION: CASES AND PERSPECTIVES 13 (2d ed. 2000) (quoting Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993)).

ties claimed exclusion on the basis of race? As discussed above, they would have to prove an intentional element in the admissions practices.[89]

If universities use the merits of GPA and standardized test scores to gauge admissions decisions in the light of evidence that in general minorities do not perform as well as non-minorities on standardized exams, then one may argue that these scores serve as a proxy for race.[90] Although the Supreme Court has addressed this issue in *Washington v. Davis*[91] and called for evidence of discriminatory intent, the Court has also departed from this standard in cases dealing with racial gerrymandering,[92] where plaintiffs do not have to prove discriminatory intent.[93] In the gerrymandering cases, the Supreme Court has taken the position that the districts are so oddly and distinctively shaped that the need to prove discriminatory intent is obviated.[94] Here the prima facie case was proved without evidence of intent.[95] Again, looking at the complainant, it becomes apparent the white complainant has a lower burden to prove, while the minority complainant is held to a higher standard. This dual standard perpetuates the status quo. Outcomes of challenges to majority supremacy can be predicted based on the race of the plaintiff.[96] White plaintiffs have been successful in recent years challenging affirmative action in university admission policies.[97]

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89. *See* Washington v. Davis, 426 U.S. 229, 239 (1976) (holding that a law is not offensive to the Constitution merely because it disproportionately impacts an ethnic group).

90. *See* Steven A. Ramirez, *A General Theory of Cultural Diversity*, 7 MICH. J. RACE & L. 33, 35 (2001) (writing that college admissions procedures that evaluate applicants on the basis of standardized tests are oppressive to minorities seeking to enter college).

91. *See Washington*, 426 U.S. at 239 (highlighting the notion of differences in standardized testing between black and white applicants).

92. See BLACK'S LAW DICTIONARY 696 (7th ed. 1999) for the following definition of gerrymandering: "The practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength." *Id.*

93. *See* Shaw v. Reno, 509 U.S. 630, 643-49 (1993) (departing from the standard that disparate impact without evidence of legislative intent does not trigger strict scrutiny).

94. *See id.* at 647 (stating that appearances do matter in reapportionment, specifically with regard to such factors as compactness, contiguity and consideration of political subordinates).

95. *See id.* 643-49 (writing that strict scrutiny review will be applied to race-neutral redistricting legislation where race provides the only possible explanation for their enactment).

96. *See e.g., id.* at 630; McClesky v. Kemp, 481 U.S. 279 (1987); *Washington*, 426 U.S. at 229; Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996); Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001); Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928 (2001).

97. *See* Lawrence, *supra* note 96, at 933 (describing CIR's as instrumental in overturning affirmative action policies in both the university and governmental sectors). *See generally Hopwood*, 78 F.3d at 932 (holding the University of Texas' admissions policy invalid

The Center for Individual Rights (CIR) successfully extinguished the University of Texas's right to use race in admissions decisions.[98] In addition, CIR has filed similar complaints against the University of Washington Law School,[99] helped defend a referendum in California ending affirmative action in the public sector,[100] and today represents plaintiffs in two cases challenging similar policies in place at the University of Michigan's undergraduate and law schools.[101] CIR intends to pursue these cases to the U.S. Supreme Court, where they believe the *Bakke* opinion will be overruled.[102]

VI. *GRATZ & GRUTTER*-TO BE OR NOT TO BE?

The facts of two Eastern District cases are similar to those of *Bakke.* In *Gratz v. Bollinger*,[103] a qualified white student denied undergraduate admission to the University of Michigan sued, claiming that policies preferring minority applicants violated her equal protection rights as well as Title VI.[104] Using *Bakke* as the basis for his opinion, Judge Duggan upheld the use of race-based admissions as consistent with the requirements

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when challenged by a white plaintiff); *Grutter*, 137 F. Supp. 2d at 821 (finding the University of Michigan Law School's admissions policy unconstitutional).

98. Lawrence, *supra* note 96, at 933 (discussing the role of the CIR in the *Hopwood* case). *See generally Hopwood*, 78 F.3d at 932 (invalidating the university's use of race in its admissions decisions).

99. Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188 (9th Cir. 2000) (holding that the university's race-conscious admissions program withstands the constitutional challenge and does not violate Title VI).

100. Proposition 209, CAL. CONST. art. I, § 31 states that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." *Id. See generally* Rachael F. Moran, *Diversity and its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CAL. L. REV. 2241 (2000) (discussing the negative impact of Proposition 209 on minority enrollment at Boalt Hall).

101. *See* Lawrence, *supra* note 96, at 932-33 (describing CIR's active role in overturning affirmative action policies in various high-profile cases); *see also* D. Frank Vinik et al., *Affirmative Action in College Admissions: Practical Advice to Public and Private Institutions for Dealing with the Changing Landscape*, 26 J.C. & U.L. 395, 396 (2000).

102. *See* Lawrence, *supra* note 96, at 933 (stating that the CIR believes the Supreme Court will hold unconstitutional any consideration of race in the university admissions context).

103. 122 F. Supp. 2d 811 (E.D. Mich. 2000).

104. 42 U.S.C. § 2000(d) (1994). Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.*; *see* Gratz v. Bollinger, 122 F. Supp. 2d 811, 814 (E.D. Mich. 2000).

of the Equal Protection Clause of the Fourteenth Amendment.[105] In addressing and declining to follow *Hopwood*, Judge Duggan criticized *Hopwood's* failure to use any precedent addressing the educational benefits of a racially diverse student body as constituting a compelling governmental interest and withstanding a strict scrutiny analysis.[106] Instead, Judge Duggan agreed with a concurring opinion in *Hopwood* which stated the Supreme Court has never ruled out diversity in the student body as a compelling governmental interest.[107] Judge Duggan concludes that Powell's diversity theory is the controlling rule of law relying on *Marks v. United States*[108] which states, "[w]hen a fragmented court decides a case and no single rationale enjoys the assent of five justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"[109]

In *Grutter v. Bollinger*,[110] Barbara Grutter, a white plaintiff, claimed that the University of Michigan Law School discriminated against her on the basis of her race.[111] She asserted that her rights under the Fourteenth Amendment's Equal Protection Clause were violated and that the law

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105. *See Gratz*, 122 F. Supp. 2d at 831 (finding that the current admissions program where minority applicants are given a "plus" on account of race, but are not removed from competition from the rest of the applicant pool, comports with the requirements set forth in *Bakke*, and is accordingly constitutional). *See generally* U.S. CONST. amend. XIV, § 1; Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

106. *Gratz*, 122 F. Supp. 2d at 821-23; *see also* Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188, 1200-01 (9th Cir. 2000) (permitting the use of race to achieve diversity); Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123, 130-31 (4th Cir. 1999) (leaving unresolved whether diversity is a compelling governmental interest); Boston's Children First v. City of Boston, 62 F. Supp. 2d 247, 258-59 (D. Mass. 1999) (rejecting the contention that diversity can never qualify as a compelling governmental interest); Hunter v. Regents of the Univ. of Cal., 971 F. Supp. 1316, 1324-27 (C.D. Cal. 1997) (rejecting the idea that the only interest that qualifies as being compelling is the remediation of past discrimination); Rosenblum, *supra* note 77, at 732 (writing on Judge Duggan's criticism of *Hopwood* for not basing its opinion on cases dealing with the benefits derived from an ethnically diverse student body).

107. *See Gratz*, 122 F. Supp. 2d at 821 (agreeing with Judge Weiner's concurring opinion in *Hopwood* that the Supreme Court has never unequivocally held that achieving diversity is not a legitimate compelling governmental interest); *see also* Hopwood v. Texas, 78 F.3d 932, 964 (5th Cir. 1996) (Weiner, J., concurring) (disagreeing with the majority decision which stated that the only valid compelling state interest is remedying past discrimination).

108. Marks v. United States, 430 U.S. 188, 193 (1977) (instructing how to extract a controlling rule of law in a plurality opinion).

109. *Id.* at 193 (citing Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)) (writing that the controlling rule of law in a plurality opinion is the opinion decided upon on the narrowest grounds).

110. Grutter v. Bollinger, 137 F. Supp. 2d 821, 823 (E.D. Mich. 2001).

111. *Id.* at 823-24.

school violated Title VI of the 1964 Civil Rights Act,[112] which forbids the recipients of federal funds from using race as grounds for discrimination.[113]

University of Michigan Law School's written admissions policy expresses an intent "to admit a group of students that collectively and individually are among the most capable students applying to American law schools in a given year . . . we seek a mix of students with varying backgrounds . . . who will respect and learn from each other."[114] The policy further states that in addition to the traditional indicators of law school success, LSAT, and undergraduate grade point averages (UGPA), "commitment to racial and ethnic diversity . . . with special reference to the inclusion of students from groups which have been historically discriminated against . . . ." will be considered.[115] In defense of this policy, the law school states that, "these students are likely to have experiences and perspectives of special importance to our mission . . . ensuring their ability to make unique contributions to the character of the law school."[116] Both *Grutter* and *Gratz* have substantially the same facts, *Bakke* guides both opinions, and yet the district judges in each case arrive at different conclusions.[117]

The *Grutter* opinion rejects the application of *Marks*, reasoning that it applies only in situations where the opinions differ slightly.[118] Furthermore, the *Grutter* court reasons that the concurring opinion's silence regarding the diversity rationale is an implicit rejection of that line of reasoning.[119] Both responses to Powell's opinion are plausible; however,

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112. 42 U.S.C. § 2000(d) (1994). The Civil Rights Act states, "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.*

113. *Grutter*, 137 F. Supp. 2d at 824; *see also* 42 U.S.C. § 2000(d) (1994) (stating the prohibition of using race to discriminate against recipient's federal funds).

114. *Grutter*, 137 F. Supp. 2d at 825 (quoting directly from the law school's admissions policy).

115. *Id.* at 826-27 (E.D. Mich. 2001).

116. *Id.* at 827-28 (E.D. Mich. 2001).

117. Mary Anne Case, *Lessons for the Future of Affirmative Action from the Past of the Religion Clauses?*, 2000 SUP. CT. REV. 325, 331-32 (2001) (describing the struggle in the lower courts to reconcile the use of affirmative action in college admissions with the *Bakke* opinion).

118. *See Grutter*, 137 F. Supp. 2d at 847 (reasoning that the *Marks* test was inapplicable because the varying positions of Justice Powell's diversity rationale and Justice Brenann's remedial rationale could not be compared for "narrowness").

119. *See id.* at 846 (E.D. Mich. 2001) (noting that the clearest indication that Justices Brennan, White, Blackmun, and Marshall disagreed with the diversity rationale is evidenced by not joining in that part of the opinion).

the persuasiveness of either response comes into question when examining the actual analysis of the issues in the opinion.

In *Gratz*, Judge Duggan affirms the use of race by applying a contextual analysis of the legal issues and their effect on social and economic interests.[120] This approach to interpreting the Constitution's Fourteenth Amendment is closely aligned to legal realism, where several factors are taken into account in interpreting the Constitution, including the economic impact and actual motivation driving both the admissions scheme and the Fourteenth Amendment.[121] *Hopwood v. Texas*[122] is a decision that Duggan does not ignore in his opinion and he easily distinguishes it.[123] In *Hopwood*, the court justified their conclusion by reasoning that the concurring opinion's silence in *Bakke*, with respect to Powell's diversity argument, implied their rejection of that rationale.[124]

Nevertheless, the same silence in the *Gratz* court's analysis just as easily implies approval.[125] Additionally, Judge Duggan relies on an array of data from experts to show the academic and societal benefits gained by both the institution and its students where admissions policies foster diversity.[126] According to the opinion, there is consensus among the 360

120. *See generally* Gratz v. Bollinger 122 F. Supp. 2d 811 (E.D. Mich. 2000) (reiterating that diversity in the context of higher education justifies the use of race as one factor in the admissions process).

121. GEOFFREY R. STONE, CONSTITUTIONAL LAW, 194-95 (Richard Epstein, et al. eds., 3rd ed. 1996) (describing both the legal formalism and legal realism approaches with regard to interpretation of the commerce clause); *see also* Anthony V. Alfieri, *Race Prosecutors, Race Defenders*, 89 GEO. L.J. 2227, 2229-30 (2001) (recognizing legal realism as a mechanism to revise law).

122. Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

123. *Gratz*, 122 F. Supp. 2d. at 821 (criticizing the Fifth Circuit for basing its analysis on a case dealing with minority business set aside programs and not within the higher education context which implicates the "uneasy marriage of the First and Fourteenth Amendments").

124. *Hopwood*, 78 F.3d at 944 (stating the four Justice plurality comprised of Justices Brennan, White, Blackmun, and Marshall, implicitly rejected Powell's position).

125. *Gratz*, 122 F. Supp. 2d. at 820 (noting that "the panel in *Hopwood* reads too much into the other Justice's silence regarding Justice Powell's diversity rationale").

126. *See* Albert M. Camarillo, *Expert Report, Reports Submitted on Behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education*, 5 MICH. J. RACE & L. 339 (1999); Eric Foner, *Expert Report, Reports Submitted on Behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education*, 5 MICH. J. RACE & L. 264 (1999); Patricia Gurin, *Expert Report, Reports Submitted on Behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education*, 5 MICH. J. RACE & L. 363 (1999); Claude M. Steele, *Expert Report, Reports Submitted on Behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education*, 5 MICH. J. RACE & L. 439 (1999); Thomas J. Sugrue, *Expert Report, Reports Submitted on Behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education*, 5 MICH. J. RACE & L. 261 (1999).

institutions, represented by the Association of American Law Schools, that the quality of education for all students is enriched when student bodies include persons of varied ethnic and racial backgrounds.[127]

In contrast, the *Grutter* court endorses the *Hopwood* panel's rejection of *Bakke* and deems the admissions policy unconstitutional.[128] To counter the negative effects that may occur in the face of discrimination, unconstitutional race classifications must yield to lawful solutions that treat all people alike regardless of the color of their skin.[129]

The *Grutter* court adopts a color-blind formalistic equal protection analysis and reasons: if there are racial preferences built into the admissions policy, they are unconstitutional.[130] A formalistic approach favors a narrow interpretive discretion so that interpretations are limited to the discovery of fact and rules of law.[131] The *Grutter* court offers no insight into the problem facing universities struggling to maintain a diverse student body.[132] The *Grutter* court dismisses defendant's evidence supporting the diversity rationale, distinguishes viewpoint diversity from racial diversity, and rejects the possibility that the two could be connected.[133]

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127. *Gratz*, 122 F. Supp. 2d at 823 (noting that "over 360 institutions represented by the Association of American Law Schools assert that they have learned through their extensive experiences . . . that the quality of education for all students is enhanced when student bodies include persons of diverse backgrounds").

128. *See* Rosenblum, *supra* note 77, at 733.

129. *See id.* at 734 (offering solutions including de-emphasis of LSAT scores, undergraduate GPA, and elimination of legacy preferences); *see also* William C. Kidder, Comment, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving "Elite" College Students*, 89 CAL. L. REV. 1055, 1062-63 (2001) (suggesting decreasing emphasis on LSAT scores in law school admissions because of disparate impact on minority groups). *See generally* Banks, *supra* note 3, at 1029 (defending class-based college admissions from merit and racial diversity critique).

130. *See* Grutter v. Bollinger, 137 F. Supp. 2d 821, 848-49 (E.D. Mich. 2001) (reading both *Adarand* and *Croson* to hold racial classifications as unconstitutional unless they remedy carefully documented past discrimination).

131. *See* GEOFFREY R. STONE, CONSTITUTIONAL LAW 194-95 (Richard Epstein et al. eds., 3d ed. 1996) (describing both the legal formalism and legal realism approaches with regard to interpretation of the commerce clause); *see also* Alfieri, *supra* note 121, at 2229-30 (describing legal realism as a mechanism to revise law).

132. *See generally Grutter*, 137 F. Supp. 2d at 821 (suggesting that universities could simply eliminate reliance on LSAT scores, undergraduate GPA's, and special considerations given to the alumni of the law school to achieve a diverse student body; however, the court does not offer advice on evaluating the overall quality of applicants without using traditional indicators of law school success).

133. *See Grutter*, 137 F. Supp. 2d at 849. The court states, "[t]he connection between race and viewpoint is tenuous, at best. The defendants walk a fine line in simultaneously arguing that one's viewpoints are not determined by one's race but that certain viewpoints might not be voiced if students of particular races are not admitted in significant numbers." *Id.*

In *Dred Scott v. Sandford*,[134] the Supreme Court, through Justice Taney, stated that the framers of the U.S. Constitution believed that African Americans were "beings of an inferior order, and altogether unfit to associate with the White race, either in social or political relations; and so far inferior that they had no rights which the white man was bound to respect."[135] Taney's hands seem to be tied with respect to the issue he announced, yet some traces of empathy, irrespective of its sincerity, can be read in the opinion.[136] In a move reminiscent of Taney's *Dred Scott* opinion, the *Grutter* court acknowledges and sympathizes with the position it rejects by acknowledging the educational and societal benefits derived from a racially diverse student body, while rejecting those benefits as compelling because they are not remedial in nature.[137] The Court throws the blame at the minorities for not performing as well as their Caucasian counterparts on the LSAT.[138] Shifting the blame, however, fails to account for disparities that arise from differences in socialization, testing bias, and unavailability of adequate preparatory resources.[139]

Friedman's opinion in *Grutter* rejects the use of quotas in admissions policies pursuant to *Bakke*, while implying that a narrow tailoring can only be achieved by allowing the use of quotas, which is unconstitutional.[140] If a university wants to pursue a goal of diversity in its student body, then a race-neutral policy is the least efficient way to achieve that goal.[141] The use of race-conscious measures would be the most efficient

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134. 60 U.S. 393 (1856).

135. *Id.* at 407.

136. *See id.* at 405 (writing that it is not the duty of the Court to decide the justice or injustice of a law).

137. *See Grutter*, 137 F. Supp. 2d at 849-50 (writing that although it is undisputed that racial diversity provides both educational and societal benefits, the fact remains that racial diversity is not a compelling state interest under *Bakke*).

138. *See Grutter*, 137 F. Supp. 2d at 866-67 (holding that racial biases in content or design of the LSAT have not been proven).

139. *See Grutter*, 137 F. Supp. 2d at 868 (rejecting the explanation that disparities in LSAT scores can be explained by language difficulties encountered by students for whom English is a second language; the court also discounts a possibilities that minorities are less likely to afford or be aware of LSAT preparatory courses).

140. *See Grutter*, 137 F. Supp. 2d at 867-68 (writing that the research presented at court did not address racial hostility to other minority groups such as Arab or Eastern European students, thus reasoning that the "narrow focus" of the research presented do not help admissions officers determine which applicants deserve a "boost").

141. Kathleen M. Sullivan, *After Affirmative Action*, 59 OHIO ST. L.J. 1039, 1054 (1998) (stating that "it would seem perverse, as a matter of constitutional law, that a permissible goal be sought by the least efficient alternative means"); *see also* K.G. Jan Pillai, *Neutrality of the Equal Protection Clause*, 27 HASTINGS CONT. L.Q. 89, 94 (1999) (noting that "Texas' race-neutral policy happens to be the least efficient means of achieving that goal").

and narrowly tailored way to achieve that goal.[142] Yet, the use of race is only permissible for a compelling state interest that is narrowly tailored to achieve that purpose.[143] The narrowest way of achieving the goal of diversity, however, is through the use of quotas, which are unconstitutional under *Bakke*.[144] Friedman also objects to the exclusion of other groups who have suffered historical discrimination.[145] Implicit in Friedman's reasoning is that the group should be expanded to include any group that has been historically discriminated against.[146] Nevertheless, expanding the protected group to include other ethnic groups without regard to their need for protection would not satisfy strict scrutiny's requirement of a narrowly tailored means to achieve an end in which the government has a compelling interest.[147]

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142. Pillai, *supra* note 141, at 94 (pointing out that a university would want to promote racial diversity in the most efficient manner possible and that race-neutral mechanisms will not produce the desired goal); *see also* Sullivan, *supra* note 141, at 1054 (questioning why any university should be compelled to use race-neutral policies when those policies promote racial diversity as effectively).

143. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995) (stating that strict scrutiny ensures that "courts will consistently give racial classifications . . . detailed examination both as to ends and as to means"); Hopwood v. Texas, 78 F.3d 932, 940 (5th Cir. 1996) (stating that strict scrutiny must be used to evaluate all racial classifications); *Grutter*, 137 F. Supp. 2d at 843 (articulating the strict scrutiny states which states that consideration of race is only permissible if it is used to further a compelling governmental interest and its use is narrowly tailored to meet that demand).

144. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 301 (1978) (holding that racial quotas are forbidden by the Constitution); *see also* Sullivan, *supra* note 141, at 1054 (writing that race neutral admissions policies are the least efficient way to achieve diversity).

145. *Grutter*, 137 F. Supp. 2d at 852 (pointing out that the inclusion of specific minorities such as African Americans, Mexican Americans, Puerto Ricans, and Native Americans to the exclusion of other minorities such as Arabs, Southern, and Eastern Europeans is unprincipled).

146. *See Grutter*, 137 F. Supp. 2d at 850-52 (objecting to the non-inclusion of other underrepresented minorities in the university's admissions policy).

147. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 506-08 (1989) (discussing the arbitrary inclusion of racial groups not in need of remedial relief does not satisfy the narrowly tailored means requirement of strict scrutiny); *see also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 284 n.13 (1986) (discussing the overinclusion of all minorities groups does not meet the narrowly tailored means of strict scrutiny); Hon. H. Lee Sarokin et al., *Has Affirmative Action Been Negated? A Closer Look at Public Employment*, 37 SAN DIEGO L. REV. 575, 583 (2000) (discussing Justice Powell's decision in *Wygant*).

VII. EMERGING DOCTRINES-THE OBSTACLE CREATED BY A COLOR-BLIND INTERPRETATION OF THE FOURTEENTH AMENDMENT

Justice Harlan first articulated his utopian ideal of what the law should be in his *Plessy v. Ferguson* dissent.[148] Although a dissenting opinion, Justice Harlan's powerful concept has gained prominence and emerged as a powerful weapon for attacking remedial efforts seeking to eradicate the continuing repercussions of discrimination against minority groups.[149] Does a color-blind interpretation of the Constitution recognize the reality that this nation gave special treatment based on race for many decades under protection of the law?[150]

Thurgood Marshall recognized the unfairness of a philosophy that forecloses the possibility of recovery from the very injustices its absence created.[151] Had the Supreme Court adopted the color-blind scheme in *Plessy v. Ferguson* and not created the "separate but equal" doctrine, the need for affirmative action would not exist.[152] Additionally, the Equal Protection Clause was adopted to provide constitutional protection against state action perpetuating the mistreatment of African Americans after the Civil War.[153] The United States Constitution was not originally drafted as a color-blind document.[154] It authorized a difference between Caucasians and African Americans and did not afford to minorities any of the protections associated with a color-blind document.[155] The truth is, for nearly a century after the Civil War, the law of the American South

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148. *See* Plessy v. Ferguson, 163 U.S. 537, 552-64 (1896).

149. Darlene C. Goring, *Private Problem, Public Solution: Affirmative Action in the 21st Century*, 33 AKRON L. REV. 209, 210-11 (2000) (describing the origins of the color-blind rhetoric and its impact on affirmative action programs). *See generally* DeFunis v. Odegaard, 416 U.S. 312 (1974); Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994); Wooden v. Board of Regents of the Univ. Sys. of Ga., 32 F. Supp. 2d 1370 (S.D. Ga. 1999); DeRonde v. Regents of the Univ. of Cal. 625 P.2d. 220 (Cal. 1981).

150. Goring, *supra* note 149, at 245-46 (describing Justice Marshall's opposition to a color-blind interpretation of the Constitution).

151. *See id.* at 246-47 (2000) (describing Marshall's criticism of the majority's interpretation of *Plessy*).

152. *See* Marco Portales, Hopwood, *Race,* Bakke *and the Constitution*, 4 TEX. HISP. J.L. & POL'Y 29, 29-30 (1998) (discussing how the failure of Equal Protection Clause to provide equal educational opportunities prevented a preponderance of minority citizens from achieving a higher class status and they now comprise America's underclass).

153. *See* Goring, *supra* note 149, at 246-47.

154. *See* Keith E. Sealing, *The Myth of a Color-Blind Constitution*, 54 WASH. U. J. URB. & CONTEMP. L. 157, 198-99 (1998) (discussing the irony of adopting a color-blind reading of the Constitution when it was never envisioned by the framers as a color-blind document).

155. *See id.* at 198-99 (1998) (stating that the framers of the Constitution viewed Eighteenth Century America in terms of black, white, yellow, and red, and thus intentionally denied citizenship to every race except White).

was segregation.[156] Today, skin color continues to matter with respect to traffic stops, airport security, border checkpoints, and immigration law.[157]

Is it possible to achieve racial equality without recognizing the fact that the dominance of white males in government, education, and economic status was achieved by artificial means? Could it be possible that the only way to dismantle this artificially constructed hierarchy is to employ laws that differentiate between the races to help minorities, rather than hinder them? Consider the following:

> To love is to suffer. To avoid suffering, one must not love. But then one suffers from not loving. Therefore to love is to suffer, not to love is to suffer, to suffer is to suffer. To be happy is to love, to be happy then is to suffer, but, suffering makes one unhappy, therefore to be unhappy one must love, or love to suffer, or suffer from too much happiness . . . .[158]

At least one legal scholar would agree with Woody Allen. Professor Alienikoff writes in *A Case for Race-Consciousness*, "color blindness supports racial discrimination . . . to end racial oppression our political and moral discourse must move from colorblindness to color-consciousness."[159] The color-blind interpretation of the Constitution is an instance of putting the horse before the cart. Race-conscious measures are needed until society evolves to a point where racial differences no longer play a role.[160] As noted above, the current trend in constitutional jurisprudence is to anoint the Constitution as a color-blind document. However valiant that proclamation may ring, the reality is that the American legal system is not prepared to fully embrace that principle. The color-blind interpretation of the Constitution, for all of its laudable intent, is an obstacle in the struggle for racial equality.[161]

The very mechanisms the government used to eradicate racial discrimination against minority groups are now being used to tear down their

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156. Erwin Chemerinsky, *What Would Be the Impact of Eliminating Affirmative Action?*, 27 GOLDEN GATE U. L. REV. 313, 313-14 (1997) (discussing the effects of Jim Crow laws on African Americans following the Civil War).

157. Ira Glasser, *American Drug Laws: The New Jim Crow*, 63 ALB. L. REV. 703, 704-05 (2000) (describing the use of race-conscious traffic stops).

158. LOVE AND DEATH (United Artists 1975) (quoting Woody Allen).

159. T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1062 (1991).

160. *See* Ilhyung Lee, *Race Consciousness and Minority Scholars*, 33 CONN. L. REV. 535, 545 (2001) (explaining Aleinikoff's rationale for advocating race-conscious measures).

161. *See id.* at 542 (2001) (quoting professor Aleinikoff's belief that it is impossible to achieve racial equality without first considering race).

creation.[162] Schools that once opposed desegregation and were forced to comply with Court decisions such as *Brown v. Board of Education*[163] are now fighting to justify their affirmative action policies to the very courts that mandated compliance.[164]

When a white person challenges a policy or governmental action under the Fourteenth Amendment, the result is often an invalidation of that law as an impermissible race distinction, regardless of whether that policy helps rather than hinders minorities.[165] Historically, when a minority challenges a law or policy on a similar basis, the courts have found either that the race or gender-based distinction serves a compelling governmental interest or a lack of discriminatory intent is enough to sustain the policy.[166] Having to prove discriminatory intent virtually guarantees a failure of that challenge. Discrimination is so ingrained in American culture, lawmakers are often unaware of the disparate impact a particular policy may have on minority groups.[167] Charles Lawrence argues that most discrimination today is the result of unconscious forces, and absent invidious intent, it is beyond the pale of constitutional prohibition.[168]

Moreover, in the post-*Brown v. Board of Education* era, blatant discrimination has succumbed to a politically correct, facially neutral discrimination. An area of the law at odds with the color-blind interpretation of the Constitution is criminal law enforcement. The ques-

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162. *See* Chisolm, *supra* note 13, at 680 (describing how the laws designed to end segregation are now being used to resegregate).

163. *See generally* Brown v. Board of Educ., 347 U.S. 483 (1954) (declaring that "separate but equal" violates the equal protection of the law under the Fourteenth Amendment).

164. *See* Adam Cohen et al., *Coloring the Campus, It's Like the 1960's in Reverse: The Schools are Trying to Integrate and the Courts Won't Let Them*, TIME, Sept. 17, 2001, *available at* 2001 WL 22575077 (describing the reversal of roles in the segregation debate).

165. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Shaw v. Reno, 509 U.S. 630 (1993); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996); Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001).

166. *See generally* Campbell v. Louisiana, 523 U.S. 392 (1998) (holding that a white defendant has standing to challenge exclusion of black jurors based on the Equal Protection Clause); Shaw v. Hunt, 517 U.S. 899 (1996) (applying strict scrutiny to strike down a redistricting plan as impermissible gerrymandering); Miller v. Johnson, 515 U.S. 900 (1995) (striking down a redistricting plan that created majority black voting districts in an action brought by five white voters); Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656 (1993) (holding the association has standing to challenge the constitutionality of an ordinance preferring minority business owners).

167. Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322, 330 (1987).

168. *See generally id.*

tion then becomes, "who is the intended beneficiary of the color-blind Constitution?"

In *United States v. Brignoni-Ponce*,[169] Justice Powell announced that race is a factor to be considered in automobile stops.[170] Yet the Fourteenth Amendment does not allow a stop where the only basis for suspicion is an occupant's apparent ancestry.[171] The Supreme Court's decision in *Bakke* is consistent with the rule announced in *Brignoni-Ponce*.[172] In both *Brignoni-Ponce's* highway stops and *Bakke's* university admissions, race may be used as one of many factors in evaluating an applicant's acceptance or in deciding whether to stop and search someone.[173] Although the condemnation of racial profiling has received wide support, race continues to be an essential component when describing suspects.[174] The inconsistency of allowing race to be a factor in racial profiling while prohibiting consideration of race in college admissions does not make any sense. What this really says is that the government will only allow the use of race when it serves a purpose that helps the government, but not when it can be used to help minorities.

A result of racial profiling is that there are greater incidences of police scrutiny if one is African American or Hispanic.[175] The disparate impact of law enforcement practices is traceable from the point of arrest to prosecution and conviction.[176] A recent report reveals that in the past

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169. 422 U.S. 873 (1975).

170. United States v. Brignoni-Ponce, 422 U.S. 873, 873 (1975) (holding that border patrols suspecting persons only because of their Mexican ancestry violated the Fourth Amendment).

171. *See generally id.* at 873 (holding that race may be one of many factors considered in determining whether to stop someone).

172. Victor C. Romero, *Racial Profiling: Driving While Mexican and Affirmative Action*, 6 MICH. J. RACE & L. 195, 203 (2000) (stating that both *Brignoni-Ponce* and *Bakke* clearly shows race's relevance).

173. *See also id.* at 197 (suggesting that while race should not be a factor in traffic stops, it should be a factor in affirmative action because of the power differentials between the races). *See generally* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265; *Brignoni-Ponce*, 422 U.S. at 873.

174. *See* R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1077 (2001) (arguing that race-based descriptions of suspects play a prominent and overlooked role in most publicized controversies); *see also* Bryonn Bain, *Walking While Black: The Bill of Rights for Black Men*, VILLAGE VOICE, Apr. 26, 2000, at 43 (detailing the arrest of a black Harvard Law School student of a crime he did not commit).

175. Maria V. Morris, Comment, *Racial Profiling and International Human Rights Law: Illegal Discrimination in the United States*, 15 EMORY INT'L L. REV. 207, 210 (2001) (discussing how international human rights law is violated daily in the United States with the practice of racial profiling and its discriminatory impact effects millions of minorities).

176. *See generally* David Baldus et al., *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of its Prevention, Detection, and*

twenty-five years, the death penalty has been imposed on crimes involving white victims in 85% of cases, despite the fact that African Americans are victims of homicide in at least 50% of all cases.[177]

Who is most likely to challenge the constitutionality of the administration of the death penalty on equal protection grounds? In *Bakke*, *Hopwood*, *Grutter*, and *Gratz*, the plaintiffs were White. In *McCleskey v. Kemp*,[178] the Supreme Court rejected an African American's Fourteenth Amendment Equal Protection claim on the grounds that he failed to establish the requisite discriminatory intent.[179] The defendant provided evidence that proved murder defendants with white victims were at least four times as likely to receive the death penalty in contrast to defendants with black victims.[180]

It is inconceivable that a white defendant would sue the government because the death penalty has a disparate impact on his race. One could almost imagine the arguments produced in such a suit. "Your honor, my client contends that the denial of the death penalty to my client violates his right to equal protection under the Fourteenth Amendment, he demands to be treated just like one of his minority colleagues and sentenced to death." It is an interesting scenario, but not likely to occur.

VIII. A PROTECTION OF DIVERSITY BY THE FIRST AMENDMENT

In *Bakke*, Justice Powell announced that "attainment of a diverse student body is a constitutionally permissible goal for an institution of higher learning" emanating from the protections afforded the First Amendment; therefore, a university is protected in its judgments as to educational pol-

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Correction, 51 WASH. & LEE L. REV. 359, 365-66 (1994) (discussing the disparities existing between white and black persons accused of violent crime); Morris, *supra* note 175, at 207 (discussing the impact of racial profiling on African Americans and Hispanics).

177. K.G. Jan Pillai, *Shrinking Domain of Invidious Intent*, 9 WM. & MARY BILL RTS. J. 525, 551 (2001) (describing how the doctrine of invidious intent has crippled the Equal Protection Clause's ability to protect claims in disparate impact in capital sentencing). *See generally* Baldus, *supra* note 176, at 359 (discussing the problem of racial discrimination in capital sentencing).

178. McCleskey v. Kemp, 481 U.S. 279 (1987).

179. *McCleskey*, 481 U.S. at 292-93 (stating a defendant must establish "the existence of purposeful discrimination" to successfully prove an equal protection violation); *see also* Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 264-65 (1977) (reiterating the principle that discriminatory intent is required to sustain an Equal Protection violation); Washington v. Davis, 426 U.S. 229, 240 (1976) (holding that a racially discriminatory purpose is a necessary element to prove a successful Equal Protection violation).

180. *See McCleskey*, 481 U.S. at 287 (citing to a statistical study performed by Professor David C. Baldus et al., commonly known as the Baldus study); *see also* Pillai, *supra* note 177, at 551 (describing the inapplicability of the Fourteenth Amendment to claims of racial discrimination in the capital sentencing context).

icy including the selection of its student body.[181] If we take this view, then what happens when governmental action interferes with the message articulated in an organization's mission statement?

In *Boy Scouts of America v. Dale*,[182] the Court upheld the Boy Scouts' categorical exclusion of homosexuals based on their mission statement, which expresses the organization's intent that their Scouts lead "morally straight lives."[183] The Court stated the forced inclusion of a person in a group interferes with that group's First Amendment freedom of expressive association when that person's presence significantly affects that group's ability to advocate their viewpoint.[184] An injunction forcing the Scouts to reinstate Dale, an affirmed homosexual, was deemed to be an impermissible infringement on the Scouts' right of intimate association.[185] Taking this reasoning a bit further, it is also true then that the forced exclusion of a wanted person in a group interferes with their ability to advocate viewpoints, be they public or private.[186]

As mentioned above, most public universities have included the attainment of a diverse student body in its mission statement in compliance with *Bakke*.[187] What happens when governmental action suppresses the message a race-conscious admission policy has on its student population and pedagogical practices? When a court invalidates a university's race-conscious admissions policy directly contradicting a published mission statement, they are restricting that university's ability to achieve the aim of their mission statement, a result directly at odds with *Dale v. Boy Scouts of America*.[188]

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181. *Bakke*, 438 U.S. at 311-12; *see also* Sweezy v. N.H., 354 U.S. 243, 263 (1957) (writing that the concept of academic freedom is actually made up of four essential freedoms which include a university's right to determine "who may teach, what may be taught, how it shall be taught, and who may be admitted for study").

182. 530 U.S. 640 (2000).

183. *Boy Scouts of America*, 530 U.S. at 649. All scouts must take a Scout Oath which among other things states that the scout will remain mentally awake and morally straight. *See id.*

184. *Boy Scouts of America*, 530 U.S. at 648 (writing that forced inclusion of a person interferes with a group's ability to advocate its public or private views); *see also* New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 13 (1988) (writing that a local law does not significantly affect that groups ability to advocate its viewpoint).

185. 530 U.S. 640, 655-56 (2000).

186. *But cf. Boys Scout of America*, 530 U.S. at 648 (holding that a forced inclusion of an unwanted person in a group may impair that group's freedom of expensive association, thus diminishing their ability to advocate their viewpoints).

187. Johnson, *supra* note 62, at 20 (stating that *Bakke* has provided the motivation for many universities incorporating diversity statements into their mission statement); *see also* Daniel & Timken, *supra* note 76, at 391-92 (stating that *Bakke* allowed universities to develop admissions policies that consider race).

188. *See Boy Scouts of America*, 530 U.S. at 648.

Using *Dale v. Boy Scouts of America*, a university could claim in retort to an anti-affirmative action suit that the exclusion of minorities in significant numbers significantly alters their message, especially in connection with a stated diversity mission statement. Theoretically, the university would thus be entitled to deference for purposes of the claim that forced exclusion of minorities violates their right of expressive association.[189] It is well established that the First Amendment protects expression without regard for the popularity of its content.[190] While affirmative action is unpopular among some in the current legal landscape, is that reason enough for government action to silence the message of diversity?

IX. TORT THEORY AND REMEDIAL RACE-CONSCIOUS ADMISSIONS POLICIES

Tort law and affirmative action policies share common threads of legal fabric: "loss and compensation, rights and responsibilities, fairness and justice as well as the basic doctrine of causation."[191] Both theories operate on the basic presumption that it is fair to compensate the victim for intentional harm.[192] Affirmative action gained currency in the late sixties and seventies as a result of the Civil Rights movement. Educational institutions adopted programs that went beyond prohibition of discriminatory practices, introducing numerous remedial measures such as race conscious monitoring and preferences.[193] As Justice Andrews observed in *Palsgraf v. Long Island R.R.*,[194] the proximate causation requirement is not a rigid rule to be applied in a mechanical manner, but a rule that is often tempered by forces outside logic and the law.[195] "What we do mean by the word 'proximate' is that because of convenience, of public

189. *See id.* at 651-52 (2000) (writing that publication of a group's viewpoint is evidence that the viewpoint exists).

190. *Boy Scouts of America*, 530 U.S. at 659; *see, e.g.* Texas v. Johnson, 491 U.S. 397 (1989) (protecting flag burning of the U.S. flag); Brandenburg v. Ohio, 395 U.S. 444 (1969) (protecting the Klu Klux Klan's call for unlawfulness as a mechanism for achieving political reform).

191. Michelle Adams, *Causation and Responsibility in Tort and Affirmative Action*, 79 TEX. L. REV. 643, 644 (2001).

192. *Id.* at 644 (drawing similarities between tort law and affirmative action and identifying their common concern for compensating injury).

193. *Id.* at 648-49 (showing how public entities instituted outreach, goals, preferences, and set-asides).

194. 162 N.E. 99 (N.Y. 1928).

195. Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 103 (N.Y. 1928); *see* Mari J. Matsuda, *Looking to the Bottom: Critical-Legal Studies Movement*, 22 HARV. C.R-C.L. L. REV. 323, 375-384 (1987) for a discussion on the similarities between tort and affirmative action jurisprudence and a suggestion that causation requirements should be relaxed for more egregious intentional torts.

policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics."[196] Justices Brennan, White, Marshall, and Blackmun, may have agreed. In *Bakke*, they equated the Title VI prohibitions with an adaptable Equal Protection Clause[197] and determined that benign discrimination for the purpose of remediation should only warrant intermediate, rather than strict scrutiny.[198] The causation rule is what sets affirmative action remedies apart from tort remedies, resulting in the beneficiaries of the affirmative action remedies not necessarily being the people who were discriminated against, but rather their descendants.[199] The key is to emphasize the lingering effects of the past discrimination.

The lingering effects of segregation and slavery include continuing disparities in wealth, education, and political power.[200] A look at the racial composition of governments at the state and national levels reveal with which racial group the political power lies. There is no doubt that Whites continue to have a stranglehold on political power. The power to challenge is closely tied to this relationship.

A pattern has emerged in cases challenging race-conscious affirmative action policies of educational institutions. Plaintiffs not benefited by the policy are able to bring suit, asserting a violation of the Fourteenth Amendment's Equal Protection Clause.[201] The university must show that discriminatory conduct in the past caused the lingering effects observed

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196. *Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting).

197. U.S. CONST. amend. XIV § 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

198. Daniel & Timken, *supra* note 76, at 396 (describing the Brennan plurality in *Bakke*, which would have permitted the admissions policy); *see also* Lee Epstein & Jack Knight, *Piercing the Veil: William J. Brennan's Account of Regents of the University of California v. Bakke*, 19 YALE L. & POL'Y REV. 341 (2001) (revealing Justice Brennan's notes and personal feeling on the 1978 *Bakke* opinion).

199. Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841, 848 (1997).

200. Chisolm, *supra* note 13 at, 687-91.

201. Adams, *supra* note 191, at 650-51. *See generally* Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123 (4th Cir. 1999) (holding Montgomery County's use of race in its transfer program as a violation of the Fourteenth Amendment Equal Protection Clause); Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998) (concluding that Boston's Latin School's consideration of race as an admissions factor was inconsistent with the Fourteenth Amendment Equal Protection Clause).

in the present.[202] This onerous burden virtually guarantees the success of plaintiffs in reverse discrimination cases and forces universities to defend their policies based on the shaky diversity rationale.

A recent New York Times/CBS Poll revealed that Blacks and Whites agree on the following: laws are still needed to protect minorities from discrimination, racial diversity is an important governmental goal, and programs that advance minorities are acceptable.[203] However, a majority of Americans polled still reject making hiring and admissions decisions based on race.[204] These numbers reflect a trend in American constitutional jurisprudence towards a race-neutral or color-blind interpretation of the Constitution.

X. CONCLUSION

Getting back to Ignacious and Reilly, is it sufficient that Ignacious prohibit further dishonesty in the workplace without compensating Mr. Reilly? Although the means of governmental discrimination against minorities have been dismantled, the harm caused has yet to be eradicated. Justice Harlan wrote that there comes a time when the past victim of discrimination ceases to be a favorite of the laws and becomes an ordinary citizen.[205] Although we are beginning to dismantle affirmative action policies on this premise, the time to abandon them has not yet come. Discarding affirmative action before its time will perpetuate and forever seal the fate of America's minority groups as citizens who continue to occupy the lower educational and economic ranks of our country.

The bottom line in the two Michigan cases is that no matter which way the Sixth Circuit decides, someone will lose. One side will suffer at the expense of the other. A qualified non-minority will lose an opportunity to enroll in the school of her choice or an underrepresented minority will not have the opportunity to break through the barriers imposed by white males who seek to maintain their preferred status as leaders of the pack. White males, to further ensure their status as superior, privileged members of society established American institutions of higher learning.

There is a long history of discrimination against minorities, especially in our nation's educational history. Disparities exist in all levels of educa-

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202. Adams, *supra* note 191, at 651 (2001) (discussing that the plaintiff must establish that at an earlier point he was discriminated against because of his race).

203. Martin D. Carcieri, *Operational Need, Political Reality, and Liberal Democracy: Two Suggested Amendments to Proposition 209-Based Reforms*, 9 SETON HALL CONST. L.J. 459, 460 (1999).

204. *Id.* at 461 (describing the tension between the seemingly compatible goals eradicating the present effects of past discrimination and eliminating consideration of race in making hiring and admissions decisions).

205. Civil Rights Cases, 109 U.S. 3, 25 (1883).

tion. The cycle begins in early education where funds are allocated to school districts by virtue of their location. Generally, the neighborhoods with the most money get the best education.[206] Caucasians live in neighborhoods that benefit most from this allocation of funds.[207] The artificial creation of diversity in institutions of higher learning is needed to dismantle these barriers and break the pattern that began with the creation of our educational system. A balancing of the harm to each group should be considered when deciding this appeal. Since both sides lose in the above scenario, it makes more sense to err on the side of party who has suffered the most. For the most part, members of all minority groups have suffered past societal discrimination in the context of disparate educational opportunities and should benefit from the use of quotas in institutions of higher learning until evidence that artificial creation of diversified student bodies is no longer necessary. Evidence that quotas are no longer needed is present when under-represented groups perform on par with their over-represented counterparts.

206. *See* Dorothy E. Roberts, Rust v. Sullivan *and the Control of Knowledge*, 61 GEO. WASH. L. REV. 587, 621-22 (1993) (writing that schools in affluent neighborhoods receive superior resources while schools in poorer neighborhoods are inadequately funded).

207. *See* Deborah Kenn, *Institutionalized Legal Racism: Housing, Segregation and Beyond*, 11 B.U. INT'L L.J. 35, 49-50 (2001) (stating that the white affluent population enjoy better schools and housing compared to poorer suburbs where minorities live).